STATE OF MICHIGAN

MICHIGAN SUPREME COURT

Bruce Behnke, Angela Behnke,

Plaintiffs/Appellees

v

Supreme Court #
COA: 248107
Lower Court Case Number: 01-5523 -NI

Estate of Karen McLean, deceased,

Defendant,

and Auto Owners Insurance Company,

Defendants/Appellants

127459

Eugene Petruska P29529
Gary Kozma P34625
Attorney for Plaintiffs/Appellees
Post Office Box 540
Gaylord, MI 49735
(989) 732-2491, Fax: 732-3830

Richard Bensinger P23906
Attorney for Def/Appellant Auto Owners
PO Box 1000
Gaylord, MI 49734
(989) 732-7536, Fax: 732-4922

Leanne Barnes Deuman P34111
Attorney for Def Estate
(Not party to appeal)
PO Box 516
Sault Ste. Marie, MI 498783
(906) 635-1513, Fax: 635-0848

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Jurisdiction Statement

Plaintiffs-Appellees does not contest Defendant-Appellant's Statement of Jurisdiction.

Counter Statement of Questions Presented

1. WHETHER THE COURT OF APPEALS ERRED IN APPLYING THE *DE NOVO* STANDARD OF REVIEW TO THE ISSUE OF WHETHER PLAINTIFF'S INJURIES CONSTITUTED A SERIOUS IMPAIRMENT OF BODY FUNCTION WHERE DEFENDANT STIPULATED TO THE APPLICATION OF A *DE NOVO* STANDARD OF REVIEW AND THE COURT OF APPEALS DID NOT OVERRULE OR REVERSE IN FINDINGS OF FACT BY THE TRIAL COURT?

   Court of Appeals Answers: No

   Plaintiff/Appellee's Answer: No

   Defendant/Appellant's Answer: Yes

   The trial court did not address the issue of the standard of review.

2. WHETHER THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFF HAD NOT SUSTAINED A SERIOUS IMPAIRMENT OF BODY FUNCTION WHERE THE IMPAIRMENT WAS OBJECTIVELY MANIFESTED, AFFECTED VIRTUALLY ALL ASPECTS OF THE PLAINTIFF'S LIFE AND CONTINUED VIRTUALLY UNABATED FOR YEARS UP TO AND INCLUDING THE DATE OF THE TRIAL IN THIS MATTER?

   Court of Appeals Answers: Yes

   Plaintiff/Appellee's Answer: Yes

   Defendant/Appellant's Answer: No

   Trial Court's Answer: No

Counter-Statement of Facts

On May 29, 1998, Plaintiff, Bruce Behnke's vehicle was rear ended by a vehicle operated by Karen McLean. (Trial transcript, p. 7). Karen McLean was uninsured and died prior to the institution of this action against her estate and Auto Owners Insurance Company, Plaintiff's uninsured motorist coverage provider. The action proceeded to bench trial on January 21, 2003.

Defendant presents a Statement of Facts in its Application which is deficient in the numerous ways detailed in Argument I below. Plaintiff offers the following Counter-Statement of Facts in an effort to cure those deficiencies.

Bruce Behnke was sitting in his vehicle, stopped at a light, when he was struck in the rear by Karen McLean's vehicle. Just prior to the impact, Mr. Behnke was looking to his left at a gas station. (Trial transcript, p. 41). The impact jolted the truck, throwing Mr. Behnke's head. (Id. at 42).

> "It paralyzed me for a second, like an electrical shock and like something snapped and I was stunned for a second. I just froze. I couldn't see or hear or do anything for a couple of seconds and then I seemed to be alright the remainder of the time." (Id.)

That evening, Mr. Behnke's neck started to get stiff, sore and swollen on one side, a condition he had never experienced before. (Id. at 44) He also started experiencing headaches. (Id.) The following morning, he could hardly move his head at all. (Id. at 45). The neck swelling had increased and he had an extremely bad headache which almost made him sick to his stomach. (Id.). He went to the emergency room where he was given a soft cervical collar and Motrin for pain, neither of which helped. (Id. at 45-46). Following the visit to the emergency room, and until his first visit with Dr. Graham regarding the

problem a few days later on 6-2-98, he continued to have swelling on the side of his neck and a persistent headache. (Id. at 46).

Mr. Behnke testified that the swelling in his neck eventually subsided somewhat, but left a knot on one side of his neck. (Id. at 48). The knot in his neck would become larger or smaller, depending on activity. (Id. at 49). He described a continuing problem with headaches. He stated that when the swelling in his neck occurred, it caused a headache that went from the back of his neck all the way forward into his head. (Id. at 49). He described the headaches as excruciating and indicated they made him sick to his stomach and kept him from doing anything whatsoever. (Id.)

During these headache episodes, he avoided noise and light and looked for somewhere dark, cold and quiet where he could stop moving. (Id. at 49). The headaches sometimes lasted all evening. (Id. at 49). Over the years, he took numerous medications to deal with the pain. (Id. at 50). He testified that none of the medications were entirely successful in taking care of the headaches. (Id. at 50). He testified that he has to take more of the medication all the time to prevent the headaches from getting a hold of him because, "once they get a hold of me, nothing will stop them." (Id. at 50-51). Over the years, the headaches have increased in frequency, and he now sometimes experiences them daily. (Id. at 54). The headaches have also become more severe. (Id.) They make it very hard for Mr. Behnke to sleep. (Id. at 76).

Mr. Behnke also testified about other symptoms. He indicated that he would have neck spasms, which he did not have before the accident. (Id. at 55). He also described a popping in his neck, which he noted particularly when he was driving and which felt like an electrical shock and numbed him. (Id. at 55). The popping sensation was something that

developed almost immediately after the accident. (Id. at 55-56). He continues to have range of motion limitations in his neck, even today. (Id. at 53).

The headaches affected Mr. Behnke's ability to do his former job as a welder. He was initially unable to return to work for a period of eight weeks. (Opinion, p.4) Upon return to work, Plaintiff experienced a swelling in the neck which generally began in the afternoon hours because of the extensive neck movements required of a welder. (Id. at 51). At times, medication resolved the problem, but on other occasions he needed to stop working until the headaches had resolved. (Id. at 51).

Since his lay off in June, 2000, Mr. Behnke's neck and headache problems have actually intensified. (Id. at 56-57). He can no longer work as a welder. (Id. at 72). He was involved as a supervisor of a snow blower crew since his lay off and experienced the typical symptoms, but, "as a supervisor, I could take breaks." (Id. at 73-74). After that, he began to work as a sawyer, which made significantly less physical demands than did his work as a welder. (Id. at 74). Nevertheless, he continued to have swelling develop in his neck about twice per week. (Id. at 74).

Mr. Behnke described the impact the headaches have on his normal life's activities. He cannot drive, engage in his past time of gardening, or engage in any other kind of normal activity when he has these debilitating headaches. (Id. at 52). Mr. Behnke continues to attempt to engage in the physical activity as required. (Id. at 65). He hopes that eventually the problems in his neck will resolve, but testified that nothing has really changed. (Id. at 65). He testified that performing activities such as yardwork, which involves a lot of looking down, will be "one of the things that really gets this headache going." (Id. at 66). He has curtailed doing any work at his mother's motel and his mother

has hired people to do the things he used to do. (Id. at 66-67). Mr. Behnke has curtailed or eliminated a variety of activities which bring about the neck pain and headaches, including snowplowing, painting, skeet shooting, dancing, driving and swimming. (Id. at 67-69).

Plaintiff also described the excruciating headaches he would experience prior to orgasm, which he testified happened about one third of the time that he has intercourse with his wife. (Id. at 69). He testified about the adverse impact these problems have had on his marital relationship. (Id. at 70-71).

No doctor has offered Mr. Behnke a cure for this problem. (Id. at 58). Other than the medications, Mr. Behnke engaged in traction type physical therapy prescribed by Dr. Zimmerman which did nothing but aggravate the situation. (Id. at 58). Mr. Behnke has also undergone three series of injections at the base of the skull, which gave him short term relief, but did not resolve the problem. (Id. at 60-61).

Medical Evidence

Three physicians testified by way of deposition on behalf of Plaintiff.

Dr. Robert Graham

Dr. Graham saw the Plaintiff approximately four days after the incident and following an earlier emergency room visit. (Graham deposition P. 5). At the time of that examination, the doctor saw and felt a swollen neck, which he testified was due to muscle stretch or tenderness secondary to the trauma of the automobile accident. (Id.) The doctor also noted the existence of a straightening of the Plaintiff's cervical lordotic curve caused by the whiplash injury sustained by the Plaintiff. (Id. 9-10).

On 6-12-98, the doctor notes that Plaintiff's neck pain had increased, resulting in decreased range of motion of Plaintiff's neck. (Id. 10-11). On 6-22-98, the Plaintiff picked up some MRI results from Dr. Graham, and a consultation with Dr. Zimmerman was scheduled. (Ex. 7). The doctor noted Plaintiff continued on Flexeral and Vicodin. At the end of July, Plaintiff was given permission to return to work without restriction. On his next visit with Dr. Graham on 10-21-98, Plaintiff continued to complain of pain in his neck and also described headaches associated with occipital muscular tension. (Id. 13). In response, Dr. Graham placed the Plaintiff on a light work restriction. (Id. 42). Dr. Graham opined that these headaches originated with the trauma from the motor vehicle accident and described the mechanism by which these headaches developed:

> "The muscles, the paraspinal muscles in the neck, the greater, lesser occipital nerves, as they exit the skull, come through the muscle mass. As the muscle would be spastic and tension, it would put pressure on the nerve. Therein lies the etiological factors for the tension headaches. As the upper back and shoulders would tense, they would compound this. Bright light, noise - - all of those things can aggravate it. And it can be severe enough - - tension headaches - - people tend to put it off as a small headache. It's not. It can be severe enough to cause unconsciousness. It all depends on how tense and how long. So it's a painful headache . . ."
>
> "Q: Alright. And this originates from the trauma that he sustained?
>
> A: Yeah. And its aggravated by what he does." (Id. at 14).

Plaintiff again saw Dr. Graham on 11-4-99 and the doctor indicated that the "neck pain was the same." (Id. at 16). Plaintiff complained of his inability to use Darvocet at work because it made him sleepy and wanted a different medication. (Id. at 50-51). Dr. Graham also found Plaintiff to be suffering from depression which he related to the incapacity created by the automobile accident injuries. (Id. at 16). The doctor also noted Plaintiff's difficulty sleeping, an effect of the pain associated with Plaintiff's ongoing

injuries. (Id). During another visit the following year on 9-11-00, Dr. Graham noted the presence of "severe cervical spasm". (Id at 17). On examination, he found tenderness in the cervical spine and markedly decreased range of motion due to muscle spasm. (Id.) The doctor further noted an incident where the Plaintiff nearly passed out while having a sexual orgasm and described "instant headache due to muscular tension in his neck." Dr. Graham directly related these symptoms to the trauma sustained in the automobile accident. (Id. at 18-19).

Dr. Graham testified that given the presence of symptoms a full 2.5 years after the original accident, Plaintiff faced a "poor healing situation at best." (Id. at 20). According to Dr. Graham, the initial injury had distorted and damaged the function and stability of the tissue and bone in Mr. Behnke's neck resulting in a chronic condition. (Id. at 15, 25, 68).

On cross examination, the Defendant attempted to establish other potential causes for Plaintiff's ongoing complaints. However, Dr. Graham changed none of the opinions discussed above. For example, where defense counsel attempted to relate the abnormal lordotic curve to a congenital blockage in Plaintiff's C4-C5 vertebra, the doctor testified that there could be a normal lordotic curve, even with the blocked vertebrae, and that he still believed the accident was the cause of the lordotic curve straightening. (Id. at 65-67). Morever, even if the straight lordotic curve preceded the accident, the kind of injury Plaintiff sustained could aggravate a previously asymptomatic problem to the kind of problem Plaintiff developed. (Id. at 9-10). Similarly, Defendant attempted to persuade the doctor to identify the ankylosing spondylitis as an independent cause of Plaintiff's injury. Instead, Dr. Graham testified that the problem was within a reasonable degree of medical certainty, related to the inflammatory process set in motion by the car accident. (Id. 69-70).

Dr. Graham's ultimate opinion regarding all of these alleged other causes was essentially that any and all of the pre-existing conditions demonstrated on x-ray when he initially began to treat Plaintiff following the car accident were variations from normal, aggravated by the accident and were "not going to respond the same." (Id. 69-70)

Dr. J. Eric Zimmerman

Plaintiff saw Dr. Zimmerman, a neurosurgeon, on a referral by Dr. Graham. On 7-8-98, Dr. Zimmerman performed an examination and found that Plaintiff continued to suffer from neck pain. (Dr. Zimmerman dep. P. 8). The doctor also heard abnormal popping of the posterior joints in the neck. (Id.) Dr. Zimmerman ruled out neurological causes for the neck pain and diagnosed the neck pain to be myofascial in nature. (Id. at 15). Dr. Zimmerman further testified that the headaches that Plaintiff experienced were not commonly associated with nerve root involvement, (Id. at 14), and thus, Dr. Zimmerman's negative neurological work up had no relation to the diagnosis of myofascial headaches. Dr. Zimmerman testified that post traumatic headache syndrome was a well accepted medical entity. (Id. at 20).

Plaintiff again saw Dr. Zimmerman in November of 2001 regarding Plaintiff's myospasm at ejaculation described above. (Id. at 10). The doctor testified that the myofascial problems which plagued Plaintiff can involve a coital trigger mechanism. (Id. at 16). He opined that he would defer to the physician in the case (Dr. Graham) regarding the relationship between Plaintiff's symptoms and the neck injury. (Id. at 13).

Dr. Susan Anderson

Dr. Anderson was a neurologist who evaluated Mr. Behnke at Dr. Graham's request in April, 2002. She noted Mr. Behnke's history of headaches which were increased by activity, started in the posterior aspect of the right side of Mr. Behnke's neck, and began following the May, 1998 accident. (Dr. Anderson dep at P. 5). Mr. Behnke also described the headaches he was experiencing during sexual activity. (Id. at 6). Dr. Anderson identified nine different medications that Mr. Behnke had taken for headaches over the years. (Id. at 7).

Dr. Anderson performed a number of tests to essentially rule out potential causes for Mr. Behnke's headaches, such as abnormalities necessitating surgery, vascular abnormalities, tumors, masses or auto-immune diseases. (Id. at 14). She testified that these other possibilities had been ruled out. (Id. at 14). Regarding the cause of Mr. Behnke's headaches, she testified:

"A: The one - - only one thing out of his complaints that I thought - - from the history that he gave, and the type of pain on examination that he demonstrated was the occipital neuralgia.

Q: Alright. And in . . . .

A: That may have been related to any type or trauma that would involve rapid deceleration, extension/flexion of the head and neck. That is something that we frequently see occipital neuralgia resulting from.

Q: Rear end impacts?

A: That could cause it, yes." (Id. P. 10-11).

Dr. Anderson also testified that Mr. Behnke should avoid his prior work as a welder because of the movement of his neck and the use of headgear required. (Id. P. 19).

Defendant called no witnesses and offered no medical evidence.

The trial court issued its opinion prior to this Court's decision in *Kreiner v Fisher*, 471 Mich 109; 683 NW2d 469 (1997) and found Plaintiff had not suffered a serious impairment of an important body function. (Opinion, p. 7). Plaintiff appealed arguing that the trial court had misapplied the no-fault threshold to the facts presented. The parties agreed that the review of the trial court's application of the threshold was *de novo*. (See Argument II(A) below).

The Court of Appeals reversed, reviewing the trial court's application of the no-fault threshold on a *de novo* basis as the parties requested. The court applied the criteria identified in *Kreiner*, supra, which was not available to the trial court.

Defendant now seeks leave to appeal to this Court. Defendant assigns error to the Court of Appeals' *de novo* review and its application of *Kreiner v Fisher.*

Argument

I. DEFENDANT'S APPLICATION SHOULD BE DISMISSED BECAUSE IT IS PROCEDURALLY DEFECTIVE.

MCR 7.302 governs the procedure to the employed in filing an Application for Leave to Appeal with this Court. Defendant-Appellant (hereinafter "Defendant") has failed to comply with this rule in numerous significant ways set forth below. This Court should deny the Application on these procedural grounds.

A. THE DEFENDANT FAILS TO PROPERLY CITE TO THE RECORD IN ITS STATEMENT OF FACTS.

MCR 7.302(A)(1)(d) requires a party to file a "concise statement of the material proceedings and facts conforming to MCR 7.212(C)(6)." This latter rule provides, in part, that the statement of facts must contain "specific page references to the transcript, the pleadings, or other documents or paper filed with the trial court." However, Defendant repeatedly fails to cite the transcript in support of numerous statements of alleged fact made. Indeed, with the exception of references to the page numbers of extensive quotations and medical records Defendant includes in its Statement of Facts, Defendant generally fails to reference the record in any way. These failures are particularly important in this case because, as discussed in more detail below, Defendant's Statement of Facts is presented in an argumentative and biased manner which is, itself, contrary to the requirements of the rule. It should not be left to this Court, or to the Appellee answering this Application, to find in the transcript any support for the claims Defendant makes in its Statement of Facts. It should not e the Appellee's responsibility to question Defendant's

assertions by searching the transcript for support Defendant merely claims to exist. This Court has previously held that such failures to cite to the record represent the basis for a dismissal of the Appeal. *Miller v Allen,* 352 Mich 95, 89 NW2d 601 (1958). The Court should apply that rule particularly where other substantial deficits exist s well.

B. DEFENDANT INCLUDES REFERENCES TO MATTERS NOT MADE A PART OF THE RELEVANT RECORD BELOW.

As clearly indicated in Defendant"s Statement of Questions presented, Defendant assigned errors relating entirely to the trial process. Yet, Defendant introduces into the record before this Court matters that were not made a part of the trial record. In particular, Appellant attaches as the deposition of Mr. Bruce Behnke; (Exhibit B), records of War Memorial Hospital (Exhibit C), and the deposition of Roland Behnke (Exhibit H). Neither these depositions nor the records were submitted to the trial court at the trial in this matter and had nothing to do with the trial or its outcome. Defendant's Statement of Facts is laced with references to these inappropriate submissions, and therefore, constitutes another reason that this Court should find Defendant's Statement of Facts to be defective and a basis for the dismissal of the Application.

References to materials introduced on appeal which were not before the trial court should, of course, be stricken. *Jeffery v Lathrup,* 363 Mich 15, 108 NW2d 827 (1961) Defendant has maintained in the court below that the depositions of Mr. Behnke and his brother should be considered on appeal, even though not introduced at trial, because they had been previously filed with the court in conjunction with the Defendant's Motion for Summary Disposition. However, that position is directly contrary to the holding in*Case v*

Gibson, 357 Mich 315, 98 NW2d 654 (1959), where deposition testimony of a witness who did not testify at the trial of the matter was not considered in reviewing the trial court's ruling on a directed verdict motion. Defendant should not be permitted to attempt to strengthen its argument regarding the resolution of the trial through the introduction of evidence on appeal that was not considered at trial.

C. DEFENDANT'S STATEMENT OF FACTS IS ARGUMENTATIVE AND BIASED.

MCR 7.212(C)(6) requires the filing of a "Statement of Facts that must be a clear, concise and chronological narrative" and that "all material facts, both favorable and unfavorable, must be fairly stated without argument or bias." The following are some of the examples of Defendant's failure to abide by the principles:

On page 5, Defendant states that "Dr. Graham found the [Plaintiff] was able to work without any restrictions." However, at no point in its Statement of Facts does Defendant inform the Court that Dr. Graham subsequently placed Plaintiff on a light work restriction. (Graham, p. 42) or that Dr. Anderson opined that it was medically inadvisable for Plaintiff to continue his life's work as a welder. (Anderson, p. 19). Similarly, on page 16, Defendant states that Plaintiff worked without impairment except for two weeks. However in truth, Plaintiff testified that his neck pain and headaches were frequent and on occasion debilitating requiring him to stop whatever he was doing even at work. (Trial transcript, p. 48-54).

Defendant similarly distorts the record regarding Dr. Graham's testimony concerning the causal links between the accident and Plaintiff's continuing injuries. Thus, Defendant cites testimony on page 64 of its Brief where Dr. Graham says its "possible" headaches on a particular office visit were unrelated to the car accident but simply ignores

Dr. Graham's overall opinion that Plaintiff's headaches are related to the trauma he sustained. (Graham, p. 14). Defendant also contends that neither Dr. Anderson nor Dr. Zimmerman relate the continuing problems to the accident, but neglect to mention that both doctors defer to Dr. Graham who does make that causal connection.

There are numerous other examples of pure argument by Defendant in its Statement of Facts, where unsubstantiated assertions are made that are simply not true. Thus, Defendant argues at page 10 that by the time Plaintiff saw Dr. Anderson, "all of Plaintiff/Appellee's pain" had "resolved" although this is clearly not true. On page 17, Defendant argues that Plaintiff's "life has not really changed" despite Plaintiff's far-reaching complaints detailed in the Counter-Statement of Facts. And, on page 23, Defendant asserts that Plaintiff never sought treatment for his sexual problems despite the deposition testimony of physicians addressing that very fact.

Thus, in an application where Defendant contends that the questions presented to this Court turn directly on the facts in this case, Appellant has presented a Statement of Facts in an argumentative and biased tone, lacking appropriate citation to the record, and repeatedly referring to matters that were not part of the record below. Plaintiff is severely prejudiced by his action because in deciding the merits of their Application, this Court will necessarily have to rely on a purported statement of facts which is, in reality, a mis-statement of facts. The Court should deny the application rather than cure these numerous deficiencies.

D. DEFENDANT HAS NOT ALLEGED ANY GROUNDS FOR APPEAL.

MCR 7.302(B) states that an application "must show" grounds for the application, and identifies the various possible grounds available. Defendant does not at any time

refer to any of these grounds. None of the grounds, except for one, are even applicable on their face. The only ground the Defendant might have raised is that the issue in this case "involved legal principles of major significance to this State's jurisprudence." However, in point of fact, Defendant's entire brief is a mere rehash of the various arguments raised and decided by this Court very recently in *Kreiner v Fisher*, 471 Mich 109; 683 NW2d 611 (2004). Indeed, as Defendant's Index of Authorities shows, the *Kreiner* case is cited ten different times in Defendant's Brief and dominates the entire argument section of the Application. Yet, Defendant has not even attempted to state why issues resolved in *Kreiner* should be readdressed. Thus, Defendant has failed to meet the requirement of identifying grounds for this application and grounds do not exist in any event.

In conclusion, because of the defects identified above, this Court is invited by Defendant to perform the following tasks in conjunction with its Application:

1. To identify and establish the grounds upon which Defendant seeks this Court's intervention;
2. To accept numerous statements of alleged fact as true, without any reference to the record;
3. To identify and delete numerous inappropriate references to matters never placed before the trier of fact; and
4. To inject into the Statement of Facts references to the record omitted by Defendant, and delete argumentative statements, in order to approximate the requirements of fairness and balance.

Plaintiff urges this Court to reject the invitation and deny the Application on these procedural grounds.

II. DEFENDANT'S ARGUMENT REGARDING THE STANDARD OF REVIEW APPLIED BY THE COURT OF APPEALS IS IMPROPERLY RAISED BECAUSE DEFENDANT STIPULATED TO THE STANDARD OF REVIEW AND IT WAS THE CORRECT STANDARD OF REVIEW IN ANY EVENT.

A. THE COURT OF APPEALS APPLIED THE STANDARD OF REVIEW REQUESTED BY DEFENDANT.

Defendant argues in its Application that the Court of Appeals applied the incorrect standard of review. However, Defendant's new position is directly contrary to the position it took in the Brief it filed in the Court of Appeals.

Plaintiff, the Appellant in the Court below, identified the standard of review to the Court of Appeals:

> The questions of law presented below are reviewed *de novo* . *Armstrong v Ypsilanti Charter Township*, 248 Mich 573, 582; 640 NW2d 321 (2001). The determination of whether the no-fault threshold has been reached is an issue of law and is also reviewed *de novo. Kern v Blethen-Coluni*, 240 Mich App 333, 341; 612 NW2d 833 (2000).
>
> Plaintiff's Brief on Appeal in the Court of Appeals, page 13.

Defendant, the Appellee in the Court below, agreed with the application of Plaintiff's proposed standard of review:

> Plaintiff-Appellant has correctly stated the standard of review, as the trial court's decision that the Plaintiff-Appellant's alleged injuries did not meet the no-fault threshold is reviewed *de novo*.
>
> Defendant-Appellee's Brief in the Court of Appeals, p. 26.

Defendant's first argument before this Court is exactly the opposite of the position the Defendant agreed to in the Court of Appeals.

" . . . . the Court of Appeals reversed the trial court by applying an improper '*de novo*' standard of review. . ."

Appellant's Argument I of Appellant's Application for Leave, p. 25.

Defendant should not be able to appeal the application of a standard of review that the Defendant itself agreed was appropriate. See *Szlinis v Moulded Fiber Glass Co.*, 850 Mich App 55; 263 NW2d 282 (1977) (Plaintiff's stipulation to the length of a foreign statute of limitations precluded an argument on appeal regarding the trial court's application of those statutes), and, *Kita v Matuszak*, 55 Mich App 288, 222 NW2d 216 (1974) (Defendant agreed to a particular trial procedure in the Court below and could not complain on appeal that the trial court applied that procedure).

B. THE COURT OF APPEALS APPROPRIATELY APPLIED THE *DE NOVO* STANDARD OF REVIEW.

It was appropriate in this case for the Court to apply the *de novo* standard of review as the parties invited the Court to do. The Defendant relies exclusively on MCR 2.613(C) which permits findings of fact by the trial court to be set aside only if clearly erroneous. However, Defendant fails to recognize that in addition to performing a fact finding function, the trial court was required by MCL 500.3135(2) to determine whether Plaintiff's injury constituted a serious impairment of body function as a matter of law. It was this second function of the trial court that was at issue in this case and that was properly subjected to a *de novo* standard of review.

Defendant maintains that the Court of Appeals must have determined that the trial court's findings of fact were erroneous, despite the undeniable fact that the Court of

Appeals never states that conclusion anywhere in its opinion. Defendant misconstrues the Court's opinion. The Court of Appeals at no time identifies a finding of fact by the trial court as clearly erroneous or establishes a new finding of fact that was different from those facts found to exist by the trial court. To the contrary, the Court of Appeals accepted the facts established in the record in the same manner as the trial court accepted those facts, but then disagreed with the trial court's decision that these facts did not constitute a serious impairment of body function. This second determination, as the statute clearly provides, is the determination of a question of law. Therefore, a *de novo* review on appeal was not only appropriate, it was mandated by statute.

Defendant seems to place great weight on the undeniably true proposition that the trial court was in the best position to judge the credibility of the witnesses and testimony placed before the court. However, it is clear from the trial court's opinion that the court did not find Mr. Behnke's testimony in any way incredible. To the contrary, throughout the trial court's opinion, the trial court relies extensively on the testimony of Mr. Behnke, his wife and the three physicians whose testimony was introduced by Plaintiff. Not once does the court reject any statement in the record as incredible or not worthy of belief. The Court of Appeals similarly accepted the record as true and at no time disagreed with the overall determination of credibility by the trial court or any particular finding of fact that the trial court expressed in its opinion. Thus, contrary to Defendant's assertion, the Court of Appeals did not review the trial court's findings of fact or substitute its own "judgment of credibility".

Defendant cites no relevant authority for its argument that the Court of Appeals applied the incorrect standard of review. None of the cases cited by Defendant even

remotely support its position that the Court of Appeals erred in this case. Defendant relies on *Precopio v City of Detroit,* 415 Mich 457; 330 NW2d 802 (1982). However, that case involved a personal injury action before the No-Fault Act was even passed and simply defined the proper standard of review of the amount of non-economic damages awarded during a bench trial. *Beason v Beason*, 435 Mich 791; 460 NW2d 207 (1990) identified the proper standard of review of divorce court judgments. Finally, *Morris v Clawson Paint Company*, 221 Mich App 280; 561 NW2d 469 (1997), also cited by Defendant, is also inapplicable because it deals with an award of damages to Plaintiff in a discrimination case and was reversed by this Court in any event at 459 Mich 256 (1998). Thus, Defendant has provided this Court with no authority for the proposition that the Court of Appeals erred in applying the *de novo* standard of review on the issue of whether the no-fault threshold was met based on the facts presented to the trial court. Defendant's argument lacks merit and its application should therefore be denied.

III. THE COURT OF APPEALS CORRECTLY FOUND AN OBJECTIVE MANIFESTATION OF PLAINTIFF'S INJURIES.

The Court of Appeals discusses its numerous bases for a finding of an objectively manifested impairment in pages 9-12 of the slip opinion attached to Defendant's Application as Exhibit A. In support of its conclusion, the Court notes that the testimony of Dr. Graham regarding his findings of muscle spasms, range of motion limitations and the swelling in Mr. Behnke's neck. The Court also discusses the diagnosis of an exacerbation of Plaintiff's objectively manifested pre-existing condition and the objective finding of Plaintiff's loss of lordosis. The Court of Appeals cites numerous cases to support its conclusion on each of these points. Defendant, however, fails to challenge any

of these conclusions specifically or attempts to distinguish the several cases relied upon by the Court of Appeals in support of its conclusion.

Instead of coming to grips with the conclusions of the Court of Appeals, Defendant merely repeats its references to the record where the doctors all agreed that the experience of pain is a subjective experience, a proposition that hardly needs medical substantiation to begin with. Defendant also clearly distorts the record at page 28 where it indicates that Dr. Graham testified that he never found any objective evidence of any injury other than a small swelling that resolved on June 2, 1998. Here, the Defendant simply ignores the substantiated testimony referenced by the Court of Appeals in support of its decision. Thus, just as the Defendant required this Court to rewrite its application in order to cure the numerous deficiencies contained therein, Defendant asks this Court to find fault with the conclusions of the Court of Appeals and distinguish the cases the Court of Appeals found compelling. The Court of Appeals correctly found an objective manifestation of Plaintiff's injuries based on the record presented and the Defendant's Application should therefore be denied.

IV. THE COURT OF APPEALS CORRECTLY FOLLOWED *KREINER V FISHER.*

In the instant case, the trial court did not have the benefit of this Court's decision in *Kreiner v Fisher* when the trial court made it's judgment pertaining to the no-fault threshold. The Court of Appeals did, however, have the benefit of that decision, and specifically examined the five different factors the Supreme Court identified as primarily relevant to the finding of impairment of Plaintiff's "general ability" to conduct the course of his normal

life. After applying all five of those factors to the facts presented, the Court of Appeals concluded as follows:

> Here, by contrast, Behnke was required to miss several weeks of work because of his injuries. Although Behnke could eventually return to full time work, unlike the plaintiff in *Kreiner*, he could not do so in the capacity in which he had worked before the accident. Both Behnke and his wife testified that Behnke enjoyed working as a welder and took great pride in his welding skills. All three of the testifying physicians indicated that Behnke should not return to welding in light of his skills. Although Behnke is currently working full time, his job duties are limited to feeding lumber into a cutting machine.
>
> Most importantly, in light of the testimony of both Behnke and his wife, we are unable to conclude that Behnke's life, unlike that of the plaintiff in *Kreiner*, is "not significantly different than it was before the accident." That testimony indicated that whereas Behnke had been a successful welder, active outdoors man, and an "energetic" "fun-loving" husband, he is now unable to work as a welder or maintain his active lifestyle which has caused him to become a frustrated and depressed person. Moreover, Behnke testified that his injuries had been "devastating" to his marriage because his headaches increased during sexual intercourse, and he estimated that at least a third of the time he would have to stop "in the middle of making love". We are convinced that these changes have altered the course of his life, causing him to change from a generally active person who excelled at a skilled job to being a generally inactive person with an unskilled job. Considering the totality of the circumstances in this case, we hold that the trial court erred in concluding that Behnke did not suffer a serious impairment of an important body function.
>
> Court of Appeals, slip opinion, p. 16

The records support these findings. The action of the Court of Appeals in applying *Kreiner v Fisher* to the facts found by the trial court are correct. Defendant, however, did not even attempt to attack the Court of Appeals decision on any of the five factors identified as important in *Kreiner.* Instead, Defendant simply continues to ignore portions of the record Defendant finds particularly difficult to deal with. Thus, Defendant does not address the fact that Plaintiff's problems are ongoing years after the accident. Defendant avoids discussion of the fact that as Dr. Graham concluded, the only available treatment

for Mr. Behnke was chronic pain relief. Defendant prefers to avoid discussion of Dr. Graham's recommendation that Mr. Behnke perform only light duty work, or Dr. Anderson's conclusion that Mr. Behnke avoid his career as a welder. Defendant declined to discuss Dr. Graham's ultimate conclusion that Plaintiff's problems will likely plague him for "the remainder of his natural life."

Based on the foregoing, Defendant has failed to demonstrate support for its argument that this Court of Appeals wrongfully applied this Court's decision in *Kreiner v Fisher*. The Application should therefore be denied.

Conclusion

Defendant filed its Application without identifying the grounds for the application as required by the court rules. For the reasons discussed above, such grounds do not exist. The Defendant argues that the Court of Appeals incorrectly applied a *de novo* standard of review despite the fact that the Defendant itself agreed that the *de novo* standard of review should be applied. Defendant's only other argument would require this Court to revisit the *Kreiner v Fisher* decision only months after its issuance. In point of fact, the Court of Appeals applied a correct standard of review, just as the parties urged, and applied in detail the most recent pronouncement of this Court on the issues the Court of Appeals faced.

Defendant's application is procedurally defective in numerous ways. Defendant distorts the record by repeatedly making assertions without reference to the record and repeatedly including for consideration by this Court materials never presented in the trial of this matter. This Court has procedural rules to safeguard a fair process to ensure that only appropriate matters are placed before this Court for review. Defendant has shirked those rules to such an extent that the rendition of fact alleged by Defendant to be true cannot be relied upon by this Court. Thus, for reasons both procedural and substantive, this Court should deny Defendant's Application for Leave to Appeal.

Dated: 12-10-07

Respectfully submitted,

BY: Eugene Petruska
Attorney for Plaintiffs/Appellees